

No. 22-1257

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LIVINGSTON EDUCATIONAL SERVICE AGENCY and
WAYNE-WESTLAND COMMUNITY SCHOOLS,
Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Secretary of Health and Human
Services; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES;
JOOYEUN CHANG, in her official capacity as Assistant Secretary and Principal
Deputy Assistant Secretary of the Administration for Children and Families;
ADMINISTRATION FOR CHILDREN AND FAMILIES; and BERNADINE
FUTRELL, in her official capacity as the Director of the Office of Head Start,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Michigan
Case No. 2:22-cv-10127 (Honorable Nancy G. Edmunds)

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs are two school districts that challenged an interim final rule issued by the Secretary of Health and Human Services in November 2021, requiring federally funded Head Start programs to ensure that their staff were vaccinated against COVID-19 (subject to exemptions). The district court denied plaintiffs' motion for a preliminary injunction. A unanimous panel denied plaintiffs' motion for an injunction pending appeal on the ground that they were not likely to succeed on the merits. *Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489 (6th Cir. 2022). Plaintiffs filed a petition for rehearing en banc, which this Court denied with no judge having requested a vote. *Livingston Educ. Serv. Agency v. Becerra*, No. 22-1257, 2022 WL 2286410, at *1 (6th Cir. June 21, 2022).

The order denying a preliminary injunction should be affirmed for the reasons set out by the district court and in this Court's prior opinion in this case. The federal government requests oral argument if the Court determines that oral argument would be helpful to it in resolving this case.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. § 1331. Compl., RE 1, Page ID # 4. The district court denied plaintiffs' motion for a preliminary injunction on March 4, 2022. 3/4/2022 Order, RE 46, Page ID # 1154. Plaintiffs filed a timely notice of appeal on March 24, 2022. Notice of Appeal, RE 49, Page ID # 1185. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE

Plaintiffs challenged an interim final rule (IFR) that the Secretary of Health and Human Services (HHS) issued in November 2021, requiring federally funded Head Start programs to ensure that their staff were vaccinated against COVID-19. The district court denied plaintiffs' motion for a preliminary injunction; this Court denied plaintiffs' motion for an injunction pending appeal; and this Court denied plaintiffs' petition for rehearing en banc (with no judge having requested a vote). The question presented is:

Whether the district court acted within its discretion in denying plaintiffs' motion for a preliminary injunction.

STATEMENT OF THE CASE

A. The Head Start Program

Head Start is a federal grant program that promotes school readiness and supports the provision of comprehensive health, education, nutritional, social, and other services to low-income children and their families. 42 U.S.C. § 9831. Program funds go directly to local grantees and do not pass through the state. *See id.* §§ 9834, 9835. Head Start grants are discretionary — no one is entitled to a Head Start grant or to attend a Head Start program. *See HHS, Grants Policy Statement*, at I-1, I-3 to I-4 (Jan. 1, 2007), <https://perma.cc/DCK6-XFMB> (Grants Policy Statement); *see also* 42 U.S.C. § 9833. When an entity chooses to apply for and receives a Head Start grant, it agrees to meet the performance standards that HHS imposes. *See Grants Policy Statement*, at I-6 to I-7; *see also* 42 U.S.C. §§ 9836(d)(2)(F), 9836a(a)(1). If an entity determines that it is unable or unwilling to maintain those standards, it may relinquish its federal grant and provide early childhood services through a non-Head Start program instead.

Congress has authorized the HHS Secretary to impose and modify performance standards for Head Start programs. 42 U.S.C. § 9836a(a)(1). Those include “administrative and financial management standards,” *id.*

§ 9836a(a)(1)(C), “standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate),” *id.* § 9836a(a)(1)(D), and “such other standards as the Secretary finds to be appropriate,” *id.* § 9836a(a)(1)(E). Congress authorized the Secretary to identify and order the correction of a program “deficiency,” *id.* § 9836a(e)(1), which Congress defined to include “a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves . . . a threat to the health, safety, or civil rights of children or staff,” *id.* § 9832(2)(A).

The Secretary has long addressed staff health and safety issues in standards that are unchallenged here. Head Start programs have a responsibility to “ensure staff do not, because of communicable diseases, pose a significant risk to the health or safety of others in the program.” 45 C.F.R. § 1302.93(a). Moreover, all Head Start personnel are required to have “an initial health examination and a periodic re-examination as recommended by their health care provider in accordance with state, tribal, or local requirements, that include screeners or tests for communicable diseases, as appropriate.” *Id.* Current standards also require staff training on prevention and control of infectious diseases and establishing

administrative procedures regarding protection from contagious diseases. *Id.* § 1302.47(b)(4)(i)(A), (b)(7)(iii).

Historically, the Secretary's standards for Head Start programs have evolved to respond to the most pressing health and medical threats of the times. In the 1990s, for example, the Secretary addressed the appropriate treatment of children with HIV. *See* 45 C.F.R. § 1308 app. (2015). In 1996, the Secretary required health examinations and tuberculosis screening for Head Start staff and regular volunteers. *See Head Start Program*, 61 Fed. Reg. 57,186, 57,210, 57,223 (Nov. 5, 1996). And in 2016, in response to public comments that it no longer made sense to single out tuberculosis, HHS revised its standards to include more general language about staff health and communicable diseases. *See Head Start Performance Standards*, 81 Fed. Reg. 61,294, 61,357, 61,433 (Sept. 6, 2016).

Other standards have likewise addressed health concerns. In 1975, just one year after Congress made Head Start a permanent program, Head Start grantees were required to assist program participants with the provision and completion of "all recommended immunizations," including diphtheria, pertussis, tetanus, polio, and measles. 45 C.F.R. § 1304.3-4(2) (1975), RE 39-3, Page ID # 830. Head Start facilities were also required to space infant cribs

at least three feet apart and exclude children with contagious illnesses from the program so as not to “pose[] a significant risk to the health or safety of the child or anyone in contact with the child.” 45 C.F.R. §§ 1304.22(b), 1304.22(e)(7) (2011).

B. The Interim Final Rule (IFR)

“COVID-19 is a highly contagious, dangerous, and ... deadly disease.” *Biden v. Missouri*, 142 S. Ct. 647, 652 (2022) (per curiam). Beginning in spring 2020, more than 90% of Head Start programs closed all in-person operations for varying lengths of time due to the virus. *Vaccine and Mask Requirements to Mitigate the Spread of COVID-19 in Head Start Programs*, 86 Fed. Reg. 68,052, 68,058 (Nov. 30, 2021). Once vaccines became widely available, the Secretary informed grantees that it expected Head Start programs to resume fully in-person service beginning in January 2022. *Id.* at 68,058, 60,062.

To promote the safe resumption of in-person operations, the Secretary issued the IFR at issue here, which required Head Start programs to ensure that their staff (including contractors and volunteers) who interact directly with students were vaccinated against COVID-19, subject to religious and medical exemptions. 86 Fed. Reg. at 68,060-61. The IFR set a January 31,

2022, deadline for staff members to receive a single-shot vaccine, obtain the second shot of a two-dose vaccine, or request an exemption from their employer. *See id.* at 68,052.¹

The Secretary made detailed findings in support of the IFR. The Secretary found that it was “necessary and appropriate to set health and safety standards for the condition of Head Start facilities that ensure the reduction in transmission of [COVID-19] and to avoid severe illness, hospitalization, and death among program participants.” 86 Fed. Reg. at 68,054. He concluded that staff vaccination was one of the best available defenses against COVID-19, explaining that most Head Start participants were at that time too young to be vaccinated and that physical distancing is difficult in early childhood settings. *Id.* at 68,054-55.

The Secretary further found that the staff-vaccination requirement was important to enable Head Start programs to operate. He explained that COVID-19 had forced the vast majority of Head Start programs to shutter in-person operations for varying lengths of time starting in the spring of 2020 and that “[p]rograms need[ed] to be able to resume fully in-person services

¹ The IFR also established a masking requirement, but that requirement is not at issue here.

to meet the needs of” the low-income children and families that the programs serve. 86 Fed. Reg. at 68,058; *see also* 86 Fed. Reg. at 68,054. Based on studies and consultations with experts, the Secretary found that closures “disrupt children’s opportunities for learning, socialization, nutrition, and continuity and routine.” *Id.* at 68,057. Moreover, closures “impose[] significant financial costs on Head Start families” by requiring parents without childcare support to stay home. *Id.*

The Secretary found good cause to issue the IFR without advance notice and comment, concluding that delaying the effective date of the IFR would be “impracticable and contrary to the public interest” because it “would endanger the health and safety of staff, children and families.” 86 Fed. Reg. at 68,059. The United States had experienced a surge of COVID-19 cases the previous winter, *id.* at 68,058, and the Delta variant – which was causing increased hospitalization rates in children – seemed poised to fuel another winter wave, *id.* at 68,052 & n.4, 68,054 & n.26. There was therefore the potential for “devastating consequences” for children and families due to program closures and service interruptions. *Id.* at 68,054. Because Head Start programs were expected to resume fully in-person services in January 2022, it was imperative that staff be vaccinated expeditiously. *Id.* at 68,062.

C. The District Court's Denial of a Preliminary Injunction

Nearly two months after the IFR was issued and less than two weeks before the deadline for Head Start personnel to be fully vaccinated, the two plaintiff school districts filed this action and moved for preliminary relief, asking that defendants be enjoined from enforcing the IFR's vaccination requirement against them. Prelim. Inj. Mot., RE 5, Page ID # 123, 136.²

The district court initially entered a limited temporary restraining order but, after further briefing and an evidentiary hearing, dissolved the temporary restraining order and denied a preliminary injunction. 3/4/2022 Order, RE 46, Page ID # 1154, 1178. The district court concluded that plaintiffs were unlikely to succeed on the merits of their claims that the Secretary did not have statutory authority to issue the IFR, *id.*, Page ID # 1160-63, and did not have good cause to issue the IFR without advance notice and comment, *id.*, Page ID # 1170-71.

In so ruling, the district court explained that the Supreme Court had recently upheld the HHS Secretary's similar requirement that staff at federally funded healthcare facilities be vaccinated against COVID-19.

² Two other school districts joined this action but later voluntarily dismissed their claims. See 4/8/2022 Order, RE 58, Page ID # 1298 n.1.

3/4/2022 Order, RE 46, Page ID # 1166-67 (citing *Missouri*, 142 S. Ct. at 651-53). The court explained that, like the IFR upheld in *Missouri*, the IFR at issue is a proper exercise of the Secretary's statutory authority to protect the vulnerable populations served by a federally funded program. *Id.* (citing *Missouri*, 142 S. Ct. at 651-53). In addition, the court found that the balance of harms and the public interest "tilt[ed] decisively in the Government's favor." *Id.*, Page ID # 1176, 1178.

Plaintiffs moved in district court for an injunction pending appeal, which the district court denied. 4/8/2022 Order, RE 58, Page ID # 1298-99. In addition to reaffirming its prior reasoning, the district court noted that plaintiffs had "produced little, if any, evidence that they [were] making good faith efforts" to comply with the IFR in the period since the denial of a preliminary injunction and that their asserted harms were thus self-imposed. *Id.*, Page ID # 1302-04.

D. This Court's Denial of an Injunction Pending Appeal

Plaintiffs moved in this Court for an injunction pending appeal. A unanimous panel denied that motion in a reasoned, published opinion. *Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489 (6th Cir. 2022). In light of the Supreme Court's *Missouri* decision, this Court concluded that

plaintiffs were unlikely to succeed on the merits of their claims that the HHS Secretary lacked good cause to issue the IFR without advance notice and comment and lacked statutory authority to establish the vaccination requirement. *See id.* at 491-93.

Plaintiffs filed a petition for rehearing en banc, which this Court denied. *Livingston Educ. Serv. Agency v. Becerra*, No. 22-1257, 2022 WL 2286410 (6th Cir. June 21, 2022). The order indicates that no judge requested a vote. *Id.* at *1.

SUMMARY OF ARGUMENT

In November 2021, the HHS Secretary issued an interim final rule requiring federally funded Head Start programs to ensure that staff who interact with children are vaccinated against COVID-19 (subject to exemptions). The district court denied plaintiffs' motion for a preliminary injunction; this Court denied their motion for an injunction pending appeal; and this Court denied their petition for rehearing en banc.

The district court's denial of a preliminary injunction should be affirmed for the reasons set out by the district court and this Court in its prior opinion in this case. Plaintiffs' claims fail on the merits under the Supreme Court's reasoning in *Biden v. Missouri*, 142 S. Ct. 647 (2022) (per curiam),

which upheld a similar IFR requiring federally funded healthcare facilities to ensure that their staff were vaccinated against COVID-19. As in that case, the Secretary has express statutory authority to protect the health and safety of participants in Head Start programs. And as in that case, the Secretary had good cause to issue the IFR without advance notice and comment.

The district court also acted within its discretion when it concluded—in denying plaintiffs’ motion for an injunction pending appeal—that plaintiffs “failed to show that they would be irreparably harmed if an injunction does not issue” and that the remaining factors “tilt[ed] decisively in the Government’s favor.” 4/8/2022 Order, RE 58, Page ID # 1305. As in *Missouri*, plaintiffs’ assertion of harm rested on their prediction that some personnel would quit rather than be vaccinated. But the Secretary took that risk into account and concluded that it was outweighed by the IFR’s benefits, including the anticipated reduction in program disruptions caused by COVID-19 infection and exposure. As in *Missouri*, plaintiffs provided no sound basis to reject the Secretary’s determination. *See Missouri*, 142 S. Ct. at 654 (explaining that a reviewing court’s role “is to ‘simply ensur[e] that the agency has acted within a zone of reasonableness’” (alteration in original) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021))).

STANDARD OF REVIEW

This Court reviews the denial of a preliminary injunction for an abuse of discretion and reviews questions of law de novo. *See Platt v. Board of Comm'rs on Grievances & Discipline of Ohio Supreme Court*, 769 F.3d 447, 454 (6th Cir. 2014).

ARGUMENT

A preliminary injunction is “an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Id.* at 20. As this Court and the district court explained, plaintiffs failed to show a likelihood of success on the merits of their claims. And as the district court further concluded, the balance of harms and public interest weighed decisively in the government’s favor.

A. The Secretary Had Statutory Authority to Issue the IFR.

1. This Court and the district court correctly concluded that plaintiffs’ challenge to the Secretary’s statutory authority fails under the reasoning of

Biden v. Missouri, 142 S. Ct. 647 (2022) (per curiam), which upheld a similar IFR requiring federally funded healthcare facilities to ensure that their staff were vaccinated against COVID-19.

Like the IFR that the Supreme Court upheld in *Missouri*, the IFR at issue here was a proper exercise of the Secretary's statutory authority to set health and safety conditions for a federally funded program. As this Court explained, "[t]he statute creating the Head Start program gives the Secretary of HHS the power to promulgate regulations to promote the health and well-being of the children in the program." *Livingston Educ. Serv. Agency v. Becerra*, 35 F.4th 489, 491 (6th Cir. 2022). The Head Start statute provides that the Secretary "shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs," including designated standards and "such other standards as the Secretary finds to be appropriate." 42 U.S.C. § 9836a(a)(1)(A), (C), (E). "In addition to that broad grant of authority, the statute also specifically provides how the Secretary may remedy 'health' risks to children in the program." *Livingston*, 35 F.4th at 492. The statute defines a "deficiency" as "a systemic or substantial material failure of an agency in an area of performance that the Secretary determines involves . . . a threat to the *health, safety, or civil rights of children*

or staff.” 42 U.S.C. § 9832(2)(A)(i) (emphasis added). The statute gives the Secretary the power to remedy deficiencies, and in particular provides that “if the Secretary finds that the deficiency threatens the *health or safety* of staff or program participants,” the Secretary must “require the agency . . . to correct the deficiency immediately.” *Id.* § 9836a(e)(1)(B)(i) (emphasis added).

The Supreme Court in *Missouri* held that similar statutory language permitted the HHS Secretary to promulgate a vaccine requirement for the staff of Medicare and Medicaid facilities. *See Livingston*, 35 F.4th at 492. The statutory provisions at issue in *Missouri* allowed the Secretary to impose conditions “in the interest of the health and safety of individuals who are furnished services” by facilities that receive Medicare or Medicaid funds. *Id.* (quoting *Missouri*, 142 S. Ct. at 652). And the Supreme Court concluded that the IFR “fits neatly within the language of the statute.” *Id.* (quoting *Missouri*, 142 S. Ct. at 652).

“The same is true here.” *Livingston*, 35 F.4th at 492. In promulgating the IFR, the Secretary determined that “[t]he risk that unvaccinated staff members could transmit a deadly disease to children in Head Start programs” – who at the time were “ineligible for the COVID-19 vaccine due

to their young age—is plainly ‘a threat to the health’ of the children.” *Id.* (quoting 42 U.S.C. § 9832(2)(A)(i)).

Moreover, as the district court explained, the IFR also falls within the Secretary’s authority to regulate the “condition . . . of facilities,” including “indoor air quality.” 3/4/2022 Order, RE 46, Page ID # 1161 (quoting 42 U.S.C. § 9836a(a)(1)(D)). The IFR sought to improve indoor air quality at Head Start facilities by reducing transmission of the virus that causes COVID-19, “which spreads through the air via respiratory droplets.” *Id.*

Furthermore, the IFR established a quintessential “administrative” standard, 42 U.S.C. § 9836a(a)(1)(C), because it was designed to ensure that the Head Start programs would actually operate. 3/4/2022 Order, RE 46, Page ID # 1161. As the district court explained, the Secretary’s goal was “to ‘keep the doors open’ at Head Start” after “nearly two years of program closures and staff shortages due to COVID-19.” *Id.* Beginning in spring 2020, more than 90% of Head Start programs closed all in-person operations for varying lengths of time due to COVID-19 infections or exposure. 86 Fed. Reg. at 68,058. The expeditious vaccination of staff was thus crucial to enable the programs to resume fully in-person service beginning in January 2022. *Id.* at 68,058, 68,062.

2. Plaintiffs' objections to the IFR echo the arguments that the plaintiffs made unsuccessfully to the Supreme Court in *Missouri* and fail for the same reasons. Plaintiffs emphasize that the Secretary has not previously imposed a vaccination requirement for Head Start personnel. Pls. Br. 10-11. But the same was true in *Missouri*. There, as here, the Secretary had previously imposed infection-control requirements for federally funded facilities. *See Livingston*, 35 F.4th at 492. There, as here, "the vaccine mandate" went "further than what the Secretary has done in the past to implement infection control," but there, as here, he had "never had to address an infection problem of this scale and scope before." *Missouri*, 142 S. Ct. at 653. "In any event, there can be no doubt that addressing infection problems" in Head Start programs is "what he does." *See id.* Indeed, plaintiffs do not challenge the preexisting infection-control standards discussed by this Court. *See Livingston*, 35 F.4th at 492. Plaintiffs' suggestion that the Secretary's authority is confined to protecting against dangers such as "splinters and rusty nails," Pls. Br. 18 (quotation marks omitted), has no basis in the statute's text and is irreconcilable with the Secretary's longstanding practice of imposing standards designed to prevent the spread of communicable disease in Head Start programs.

Like the plaintiffs in *Missouri*, plaintiffs here assert that the IFR violates the major questions doctrine, the canon of federalism, and nondelegation principles.³ Those arguments did not persuade the Supreme Court and they are even less persuasive here. Whereas the IFR at issue in *Missouri* affected more than 10 million staff at healthcare facilities, *see Missouri*, 142 S. Ct. at 655 (Thomas, J., dissenting), the IFR at issue here affected just 273,000 Head Start workers, 86 Fed. Reg. at 68,077, and a share of the approximately 1 million volunteers who interact with children in certain in-person settings, *see id.* at 68,068. Moreover, Head Start grants are discretionary, *see Grants Policy Statement, supra*, and Head Start programs cover only a small fraction of children under age 6, *see* 86 Fed. Reg. at 68,077 (estimated number of children enrolled in Head Start programs); Forum on Child & Family Statistics, *POP1 Child Population: Number of Children (in Millions) Ages 0-17 in the United States by Age, 1950-2020 and Projected 2021-2050*, <https://perma.cc/8EU9-V2HA> (projected number of children under the age of 6). If a particular grantee is unwilling or unable to comply with the Head

³ Compare Pls. Br. 36-39, with Response to Application for a Stay, *Biden v. Missouri*, No. 21A240 (U.S. Dec. 30, 2021), 2021 WL 8946189, at *22-24, and Response to Application for a Stay Pending Appeal, *Becerra v. Louisiana*, Nos. 21A240, 21A241 (U.S. Dec. 30, 2021), 2021 WL 8939385, at *22-24, *26-28.

Start program standards, it is free to relinquish its grant and provide early childhood services through a non-Head Start program instead. The IFR did not “intrude on state police powers” any more than do “the longstanding rules conditioning federal funds on requiring that Head Start personnel do not ‘pose a significant risk’ ‘of communicable disease.’” 3/4/2022 Order, RE 46, Page ID #1173 (quoting 45 C.F.R. § 1302.93(a)).⁴

B. The Secretary Had Good Cause to Issue the IFR Without Advance Notice and Comment.

Plaintiffs’ procedural challenge to the IFR likewise fails under the Supreme Court’s reasoning in *Missouri*. See *Livingston*, 35 F.4th at 491. Just as the Secretary had good cause to issue the IFR at issue in *Missouri* without advance notice and comment, the same is true of the IFR at issue here.

⁴ The district court correctly declined to follow two preliminary-injunction opinions that predated the Supreme Court’s *Missouri* decision and thus did not take into account the Supreme Court’s reasoning. See 3/4/2022 Order, RE 46, Page ID # 1164 n.3 (citing *Louisiana v. Becerra*, No. 3:21-CV-4370, 2022 WL 16571 (W.D. La. Jan. 1, 2022), and *Texas v. Becerra*, No. 5:21-CV-300-H, 2021 WL 6198109 (N.D. Tex. Dec. 31, 2021)). Indeed, the *Louisiana* opinion on which plaintiffs rely was issued by the same judge whose preliminary injunction was stayed by the Supreme Court in *Missouri*.

In the *Texas* case, merits briefing in district court is complete and awaiting decision. Merits briefing is in progress in the *Louisiana* case.

An agency may issue an interim final rule “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.” *Livingston*, 35 F.4th at 491 (alteration in original) (quoting 5 U.S.C. § 553(b)(B)). In *Missouri*, the Supreme Court held that the HHS Secretary was not required to use notice-and-comment rulemaking to issue a vaccination requirement for the staff of facilities funded by Medicare and Medicaid. *Id.* (citing *Missouri*, 142 S. Ct. at 654). The Supreme Court concluded that “the Secretary’s finding that accelerated promulgation of the rule in advance of the winter flu season would significantly reduce COVID-19 infections, hospitalizations, and deaths . . . constitutes the ‘something specific’ . . . required to forgo notice and comment.” *Id.* (alterations in original) (quoting *Missouri*, 142 S. Ct. at 654).

“Similarly, in this case the Secretary made a specific finding that “[t]he Delta variant, which in the summer of 2021 became the predominant SARS-CoV-2 strain in the United States, is more contagious—spreading twice as fast—and results in more cases and hospitalizations for children.” *Livingston*, 35 F.4th at 491 (alteration in original) (quoting 86 Fed. Reg. at 68,055). The IFR explained that the vaccination requirement would “protect

individuals and the people with whom they live and work from infection and from severe illness and hospitalization if they contract the virus.” 86 Fed. Reg. at 68,054-55. Furthermore, the IFR explained that the vaccination requirement would reduce program closures due to infection and exposure, which “impose hardship on Head Start children and families by diminishing the ability to attend Head Start in person.” *Id.* at 68,055.

In short, the IFR contained “ample discussion of the evidence in support of a vaccine requirement and the Secretary’s justifications for enacting the requirement.” *Livingston*, 35 F.4th at 491 (citing 86 Fed. Reg. at 68,055-59). As in *Missouri*, there is no merit to plaintiffs’ assertion that the time the Secretary took to prepare the rule “constitutes ‘delay’ inconsistent with the Secretary’s finding of good cause.” *Missouri*, 142 S. Ct. at 654. The Head Start IFR is 50 pages long and contains 144 cited sources. The Secretary’s care in crafting the rule in no way undercuts his finding that it was necessary to allow the safe resumption of in-person Head Start operations. 3/4/2022 Order, RE 46, Page ID # 1171.

C. The Balance of Equities and Public Interest Weighed Decisively in the Government's Favor.

The district court also acted within its discretion in finding that the balance of harms and the public interest “tilt[ed] decisively in the Government’s favor.” 3/4/2022 Order, RE 46, Page ID # 1176, 1178; *see also* 4/8/2022 Order, RE 58, Page ID #1305. The harm that plaintiffs asserted below was analogous to the harm that the plaintiffs asserted in the *Missouri* case. There, the plaintiffs argued that healthcare workers would quit rather than be vaccinated, which would lead to staffing shortages. *See Missouri*, 142 S. Ct. at 654. However, the Supreme Court explained that the Secretary took that risk into account in issuing the IFR, and the Court rejected the plaintiffs’ claim that it was arbitrary and capricious for the Secretary conclude that the IFR’s benefits outweighed that risk. *See id.* The Court emphasized that the role of a reviewing court “is to ‘simply ensur[e] that the agency has acted within a zone of reasonableness.’” *Id.* (alteration in original) (quoting *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021)).

Here, too, plaintiffs claimed that Head Start personnel would quit rather than be vaccinated, which would lead to program disruptions or closures. *See, e.g.,* Hubert Decl., RE 42-8, Page ID # 1040-51. But as the

district court explained, the Secretary took that risk into account and found it outweighed by the IFR's benefits. The Secretary explained that COVID-19 infections "also close classrooms and cause interruptions in the services provided to Head Start families." 3/4/2022 Order, RE 46, Page ID # 1176-77; see 86 Fed. Reg. at 68,055 (explaining that when a staff member or child tests positive for COVID-19 "classrooms or entire programs close for a period of days or weeks to allow for test results and quarantining"). The Secretary concluded that "these infection-related closures" are especially disruptive because they are "unpredictable and often occur at the last minute leaving parents to struggle to find suitable last-minute childcare." 3/4/2022 Order, RE 46, Page ID # 1177 (citing 86 Fed. Reg. at 68,076). As in *Missouri*, the Secretary's determination was reasonable and thus must be sustained.

It is, moreover, unclear that plaintiffs' predicted harms remain relevant at this juncture. Plaintiffs represented to this Court that those harms would come to pass if the IFR were not enjoined pending appeal. See Pls. Mot. for Inj. Pending Appeal 25. Since this Court denied their motion for an injunction pending appeal, plaintiffs have presumably complied with the IFR.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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SEPTEMBER 2022

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,607 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Book Antiqua 14-point font, a proportionally spaced typeface.

/s/ Sarah J. Clark
SARAH J. CLARK

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

/s/ Sarah J. Clark
SARAH J. CLARK

**DESIGNATION OF RELEVANT
DISTRICT COURT DOCUMENTS**

Pursuant to Sixth Circuit Rule 28(b)(1)(A)(i), the government designates the following district court documents as relevant:

Record Entry	Description	Page ID # Range
RE 1	Complaint	1-47
RE 5	Motion for Preliminary Injunction	122-73
RE 6	Emergency Motion for Temporary Restraining Order (TRO)	367-78
RE 18	Opposition to Motion for TRO	388-96
RE 19	Reply on Motion for TRO	397-410
RE 20	Order Granting in Part and Denying in Part Motion for TRO	411-20
RE 31	Emergency Motion to Clarify or Extend TRO	487-501
RE 32	Order Granting Motion to Extend Temporary Restraining Order	502-04
RE 35	Opposition to Motion for Preliminary Injunction	572-633
RE 39	Reply on Motion for Preliminary Injunction	761-80
RE 39-3	45 C.F.R. § 1304.3-4(2) (1975)	799-868
RE 42-8	Declaration of Richard Michael Hubert (Feb. 23, 2022)	1040-51
RE 42-9	Declaration of Richard Michael Hubert (Jan. 29, 2022)	1053-59
RE 42-10	Declaration of Michael Kapolka (Feb. 24, 2022)	1061-67
RE 46	Order Denying Motion for Preliminary Injunction	1154-78
RE 49	Notice of Appeal	1185-86
RE 50	Motion for Injunction Pending Appeal	1187-97
RE 55	Transcript of Preliminary Injunction Hearing	1204-84
RE 56	Opposition to Motion for Injunction Pending Appeal	1285-95
RE 58	Order Denying Motion for Injunction Pending Appeal	1298-1306

ADDENDUM

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5 U.S.C. § 553(b)

§ 553. Rule making

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

42 U.S.C. § 9831

§ 9831. Statement of purpose

It is the purpose of this subchapter to promote the school readiness of low-income children by enhancing their cognitive, social, and emotional development—

- (1) in a learning environment that supports children's growth in language, literacy, mathematics, science, social and emotional functioning, creative arts, physical skills, and approaches to learning; and
- (2) through the provision to low-income children and their families of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary.

42 U.S.C. § 9836a(a)

§ 9836a. Standards; monitoring of Head Start agencies and programs

(a) Standards

(1) Content of standards

The Secretary shall modify, as necessary, program performance standards by regulation applicable to Head Start agencies and programs under this subchapter, including—

(A) performance standards with respect to services required to be provided, including health, parental involvement, nutritional, and social services, transition activities described in section 9837a of this title, and other services;

(B) scientifically based and developmentally appropriate education performance standards related to school readiness that are based on the Head Start Child Outcomes Framework to ensure that the children participating in the program, at a minimum, develop and demonstrate—

(i) language knowledge and skills, including oral language and listening comprehension;

(ii) literacy knowledge and skills, including phonological awareness, print awareness and skills, and alphabetic knowledge;

(iii) mathematics knowledge and skills;

(iv) science knowledge and skills;

(v) cognitive abilities related to academic achievement and child development;

(vi) approaches to learning related to child development and early learning;

(vii) social and emotional development related to early learning, school success, and social problemsolving;

(viii) abilities in creative arts;

(ix) physical development; and

(x) in the case of limited English proficient children, progress toward acquisition of the English language while making meaningful progress in attaining the knowledge, skills, abilities, and development described in clauses (i) through (ix), including progress made through the use of culturally and linguistically appropriate instructional services;

(C) administrative and financial management standards;

(D) standards relating to the condition and location of facilities (including indoor air quality assessment standards, where appropriate) for such agencies, and programs, including regulations that require that the facilities used by Head Start agencies (including Early Head Start agencies and any delegate agencies) for regularly scheduled center-based and combination program option classroom activities —

(i) shall meet or exceed State and local requirements concerning licensing for such facilities; and

(ii) shall be accessible by State and local authorities for purposes of monitoring and ensuring compliance, unless State or local laws prohibit such access; and

(E) such other standards as the Secretary finds to be appropriate.

(2) Considerations regarding standards

In developing any modifications to standards required under paragraph (1), the Secretary shall —

(A) consult with experts in the fields of child development, early childhood education, child health care, family services (including linguistically and culturally appropriate services to non-English speaking children and their families), administration, and financial management, and with persons with experience in the operation of Head Start programs;

(B) take into consideration —

(i) past experience with use of the standards in effect under this subchapter on December 12, 2007;

- (ii) changes over the period since October 27, 1998, in the circumstances and problems typically facing children and families served by Head Start agencies;
- (iii) recommendations from the study on Developmental Outcomes and Assessments for Young Children by the National Academy of Sciences, consistent with section 9844(j) of this title;
- (iv) developments concerning research-based practices with respect to early childhood education and development, children with disabilities, homeless children, children in foster care, and family services, and best practices with respect to program administration and financial management;
- (v) projected needs of an expanding Head Start program;
- (vi) guidelines and standards that promote child health services and physical development, including participation in outdoor activity that supports children's motor development and overall health and nutrition;
- (vii) changes in the characteristics of the population of children who are eligible to participate in Head Start programs, including country of origin, language background, and family structure of such children, and changes in the population and number of such children who are in foster care or are homeless children;
- (viii) mechanisms to ensure that children participating in Head Start programs make a successful transition to the schools that the children will be attending;
- (ix) the need for Head Start agencies to maintain regular communications with parents, including conducting periodic meetings to discuss the progress of individual children in Head Start programs; and
- (x) the unique challenges faced by individual programs, including those programs that are seasonal or short term and those programs that serve rural populations;

(C)

(i) review and revise as necessary the standards in effect under this subsection; and

(ii) ensure that any such revisions in the standards will not result in the elimination of or any reduction in quality, scope, or types of health, educational, parental involvement, nutritional, social, or other services required to be provided under such standards as in effect on December 12, 2007; and

(D) consult with Indian tribes, including Alaska Natives, experts in Indian, including Alaska Native, early childhood education and development, linguists, and the National Indian Head Start Directors Association on the review and promulgation of standards under paragraph (1) (including standards for language acquisition and school readiness).

(3) Standards relating to obligations to delegate agencies

In developing any modifications to standards under paragraph (1), the Secretary shall describe the obligations of a Head Start agency to a delegate agency to which the Head Start agency has delegated responsibility for providing services under this subchapter.